IN THE SUPREME COURT OF FLORIDA

MICHAEL GORDON REYNOLDS,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	**CASE NO. SC10-1602**
STATE OF FLORIDA,	)	**L.T. NO. 98-3341-CFA**
	)	
Appellee.	)	
_____	)	

REPLY BRIEF OF APPELLANT

On Appeal from the Circuit Court of the Eighteenth Judicial Circuit in and for Seminole County, Florida

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ARGUMENT

I.
THE TRIAL COURT ERRED IN SUMMARILY DENYING CLAIMS 3A, 5, 10, 12, A-III, A-IV & A-V WITHOUT AN EVIDENTIARY HEARING AS THEY ARE FACIALLY SUFFICIENT AND NOT CONCLUSIVELY REFUTED BY THE RECORD

The trial court's order on appeal summarily denied Reynolds's postconviction Claims 1, 2, 3A, 5, 10, 12, A-III, A-IV, and A-V, without an evidentiary hearing. As Reynolds's facially sufficient motion asserts he was denied effective assistance of counsel, and because there remain issues of material fact, reversal is required.[1]

The State's Answer Brief makes several arguments in opposition to the points ultimately selected to be raised and discussed in Appellant's Initial Brief on Appeal.[2] The legal and logical fallacies inherent in the State's arguments as to the summary denials of Claims 3A, 5, 10, 12, A-III, A-IV and A-V will be discussed *seriatim*.

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[1] Summary denial of a motion filed pursuant to Rule 3.851 is subject to *de novo* review, accepting the motion's factual allegations as true, and affirming only if the motion fails to state a facially sufficient claim or there is no issue of material fact. *Seibert v. State*, SC08-708, 08-1615, --- So.3d ---, 2010 WL 2680239 (Fla. 2010).

[2] As noted in the Appellant's Initial Brief on Appeal, page 36 n.1, the Motion's "Claims 14 and 15 did not require an evidentiary determination and the trial court deemed Claim 16, cumulative error, premature. (PCR 996-1052). The denial of claims not raised herein as points on appeal are conceded on procedural grounds."

SUMMARY DENIAL OF CLAIM 3A

INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO OBJECT OR CURE THE FALSE TESTIMONY OF CHARLES BADGER

The trial transcript indicates that, *at trial*, DNA Expert Charles Badger testified *before Reynolds's jury* as follows:

> [T]hose results that were obtained were found to be consistent or matched the DNA results that were obtained were found to be consistent or **matched the DNA profile of Christina Razor and Michael Reynolds.** Robin Razor and Danny Privett were excluded from being the donors of the DNA profile observed.

(Vol. 17, R2015) (emphasis added). It was only *after* trial, *after* this Court's review of the record on appeal, and *after* this false testimony bolstering the State's attempted sexual battery theory was revealed by postconviction counsel, that the State moved to "correct" what the State now casts as "obviously a scrivener's error." State's Answer Brief, pages 49-50. The State's motion to correct the record was denied and the purported scrivener's error never "corrected." (Vol. 5, R627-628).[3]

[3] As the court reporter's affidavit, prepared only *after* the trial court had already decided to summarily deny this claim, is "not part of the files and records in this case, it could not have been considered even by the trial court in determining the facial sufficiency of the motion." *Russell v. State*, 521 So.2d 379 (Fla. 1st DCA 1988). See also *McCorkle v. State*, 419 So.2d 373 (Fla. 1st DCA 1982) (same).

The State tries to cure this false testimony on the vaginal DNA results, arguing "there was a '.' in the wrong place," State's Answer Brief, page 50;[4] that counsel said "that if the transcript were changed to change the period, Badger's testimony would ... be consistent with Badger's report;" that "markers shown in the report show that the results could not possibly match both Christine Razor and Reynolds;"[5] and that since "the testimony was actually consistent with the report, there was no reason for Iennaco to object." State's Answer Brief, pages 50-51. This Court is, however, bound by the *record* facts. The State here unintentionally argues for counsel's ineffectiveness in failing to object to *record* scientific testimony contrary to the vaginal DNA evidence itself by pointing out counsel's insufficiency

[4] Even under the State's theory, the unaltered trial transcript would have more than "a '.' in the wrong place." Answer Brief, page 50. In order to alter the trial transcript to the State's liking, one would have to make 3 changes: (1) insert a period after "Christina Razor" where none existed, (2) change a lowercase "a" to uppercase "A" after that newly added period, and (3) change a period to a comma after "Reynolds."

[5] The trial court also relied on this dubious logic that since "presence of a gender marker would necessarily make the identification of the DNA coming from both [Reynolds] and [Christina] a genetic impossibility," Badger's actual testimony before the jury was *ergo* what the State now claims. (Vol. 10, R1646 n. 2). Whereas the State concludes that "[t]hese findings are supported by competent, substantial evidence," Answer Brief, page 51, the foregoing comprises neither a "finding" (as the trial court "simply let the transcript speak for itself," *id.*), nor competent substantial evidence, as the proposition that the conclusions in Badger's trial record testimony would have been a "genetic impossibility" does not logically support the State's contention that Badger's trial testimony was what the State claims years after direct appeal, in direct contradiction to the trial transcript).

in failing to object to *record* scientific testimony contradicted by the evidence, and itself argues the record testimony was false because the vaginal DNA results could not possibly match both Christina and Reynolds—all in the face of the State's theory that the murders occurred during an attempted sexual battery on Christina.

The State's *innuendo* that Reynolds claims the State argued "that Reynolds's sperm was on Christina's vaginal swabs," State's Answer Brief, page 51, is a red herring. The word "sperm" appears nowhere in the Initial Brief. The word "semen" appears once—in quoting the trial court's order denying relief. Instead, the Initial Brief notes: "Badger told Reynolds's jury his DNA was found inside the minor Christina's vagina, and counsel's failure to object to this damning scientific testimony played directly into the State's Attempted Sexual Battery theory argued in closing argument." Appellant's Initial Brief, page 37. The State's Attempted Sexual Battery theory espoused in its closing argument implied Reynolds *attempted* to rape Christina which, without leaving behind semen, could leave behind DNA—and Badger's false testimony played right into the State's theory. Defense counsel's failure to object to the introduction of Badger's false scientific testimony fell far below objective standards of reasonably effective assistance of counsel in a capital murder trial, prejudicing Reynolds in jurors' eyes and contributing to the verdict.

Counsel's failure to object to this presentation of false testimony discarded Reynolds's right to a fair trial and barred the misconduct from appellate review. *Garcia v. State*, 644 So.2d 59 (Fla. 1994). Prejudice is manifest as "[t]estimony emanating from the depth and scope of specialized knowledge is very impressive to a jury." *Ake v. Oklahoma,* 470 U.S. 68, 82 n.7 (1985). No full and fair hearing was held to determine whether the transcript accurately recorded the trial testimony. An evidentiary hearing is required to properly analyze the trial transcript. *Seibert v. State*, Nos. SC08-708, 08-1615, --- So.3d ----, 2010 WL 2680239 (Fla. 2010) ("When determining whether an evidentiary hearing is required on an initial rule 3.851 motion, a court cannot look beyond the filings. An evidentiary hearing must be held whenever the movant makes a facially sufficient claim that requires a factual determination.").

The cases the State cites are not to the contrary. *Troy v. State*, 57 So.3d 828, 834 (Fla. 2011) (the "decision of whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on the *written* materials before the court") (emph. added); *Franqui v. State*, 59 So.3d 82, 95 (Fla. 2011) (the "decision whether to grant an evidentiary hearing on a rule 3.850 motion is ultimately based on *written* materials before the court") (emph. added). As the written materials at bar do not support a summary denial, this Court should remand for an evidentiary hearing.

SUMMARY DENIAL OF CLAIM 5

TRIAL COUNSEL WAS INEFFECTIVE AND PREJUDICED THE OUTCOME OF DEFENDANT'S CASE WHEN COUNSEL FAILED TO OBJECT TO A MISSTATEMENT OF THE LAW GIVEN BY THE COURT TO THE JURY. COUNSEL WAS FURTHER INEFFECTIVE AND PREJUDICED THE DEFENDANT BY NOT MOVING FOR A MISTRIAL BASED ON THIS IMPROPER AND HIGHLY PREJUDICIAL STATEMENT REGARDING THE BURDENS OF PROOF AT TRIAL

The trial court told jurors: "the State doesn't have to do anything, you can't hold it against them." (V9, R571). Counsel failed to object. The State's notion that "this issue should have been raised on direct appeal and is procedurally barred," Answer Brief, page 52, lacks merit. As in *Bruno v. State,* 807 So.2d 55 (Fla.2001):

> Whereas the main question on direct appeal is whether the trial court erred, the main question in a *Strickland* claim is whether trial counsel was ineffective. Both claims may arise from the same underlying facts, but the claims themselves are distinct and--of necessity--have different remedies: A claim of trial court error generally can be raised on direct appeal but not in a [3.851] motion, and a claim of ineffectiveness generally can be raised in a [3.851] motion but not on direct appeal.

Bruno v. State, 807 So.2d at 63.

Nor does the law support the State's notion that the errant instruction shifting the burden to Reynolds was made non-prejudicial by proper instructions,

State Answer, pages 21-24, as "the defect involves an erroneous reasonable doubt standard....When jurors are faced with both correct and erroneous instructions as to the applicable legal rules, there is no reason to believe that they are likely to intuit which is the correct one and which is the erroneous one," and "[t]he conclusion is therefore inescapable that the jury may well have decided this case under an erroneous instruction as to the burden of proof." *Murray v. State*, 937 So.2d 277, 280 (Fla. 4th DCA 2006). See also *Quaggin v. State*, 752 So.2d 19 (Fla. 5th DCA 2000) (prosecutor's misstatement of murder defendant's burden of proof not cured by defense counsel's correct statement and trial court's later instruction that defendant did not have to prove anything); *Paul v. State*, 980 So.2d 1282, 1283 (Fla. 4th DCA 2008) ("the instructions given by the trial court following the objection did not sufficiently erase the confusion created by the burden shifting comment... Despite generally stating that the State has the burden of proof, the trial court failed to specifically rebuff the State's comment that Paul had the burden"). [6]

[6] "[W]here...a trial judge gives an instruction that is an incorrect statement of the law and necessarily misleading to the jury, and the effect of that instruction is to negate the defendant's only defense, it is fundamental error and highly prejudicial to the defendant." *Williams v. State*, 982 So.2d 1190, 1194 (Fla. 4th DCA 2008). Reynolds's sole defense was reasonable doubt, and the trial court's misstatement of the law, relieving the State from its burden of proof, negated that only defense.

No case cited in the Answer Brief, pages 55-56, saw a trial court tell a jury: "the State doesn't have to do anything, you can't hold it against them." (V9, R571).

Though the usual remedy on summary denial where the record fails to show conclusively that a movant is entitled to no relief is to remand for an evidentiary hearing, here, where the State admits "[t]he record shows on its face that the judge failed to correct the misstatement," State's Answer Brief, page 52, and counsel failed to object, request a curative instruction or mistrial, a new trial is required.

SUMMARY DENIAL OF CLAIM 10

COUNSEL WAS INEFFECTIVE AND PREJUDICED DEFENDANT WHEN COUNSEL FAILED TO OBJECT TO IMPERMISSIBLE LAY WITNESS TESTIMONY CONCERNING THE METALLURGICAL CONDITION OF DEFENDANT'S TRAILER DOOR

The State's argument that "whether cutting off a piece of metal will leave a shiny mark" requires no expertise, State's Answer Brief, pages 56-58, lacks merit.[7]

[7] The testimony used to discredit Reynolds's explanation for his injury follows:

> [DET. PARKER]: . . . the entire notch was nice and shiny. If it had been cracked and a piece of it sticking out, first place, it would have to be really sticking out to cut his finger like that, in my opinion. Secondly, it would have been gray somewhere in that crack. And the piece that we found and the entire notch that it went to is nice and shiny as though it had just been created.
>
> [MR. HASTINGS]: Now he had already come up with that explanation at that time when you were out there, did he not?
>
> [DET. PARKER]: Yes.

Parker lacked the special knowledge, experience, skill or training required to express an opinion as to whether the aluminum door had actually "cracked", whether the notch was sticking out enough for Reynolds to cut himself, or whether the door notch should have been "gray" instead of "nice and shiny." Compare *Amazon v. State*, 487 So.2d 8, 12 (Fla. 1986) (expert in metallurgy, though unable to conclusively say marks on screen removed to enter victims' home were made with murder weapon, could give testimony based on his expert knowledge that there was a high probability that murder weapon made marks as "[t]he testimony was probative evidence requiring specialized knowledge"), with *Gilliam v. State*, 514 So.2d 1098 (Fla. 1987) (as medical examiner was not expert in shoe-pattern evidence, she was not qualified to testify about marks on decedent); *Nardone v. State*, 798 So.2d 870 (Fla. 4th DCA 2001) (officer's opinion testimony that metal strip used during assault was deadly weapon reversible error as officer did not witness assault, testimony was not based on officer's personal observations of how metal strip was used, and there was no predicate for expert testimony on whether strip was deadly weapon as there was no evidence as to how defendant used strip and no showing that such a factual

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(V12, 1196-1199; V13, 1205-1207) (emphasis added).

determination was not within realm of ordinary juror's knowledge and understanding); *Kelvin v. State*, 610 So. 2d 1359, 1364 (Fla. 1st DCA 1992) (where photograph showed dowels stuck through bullet holes in sofa to show bullet's flight path, reversible error to permit evidence technician to testify the dowels showed the bullets' flight path as witness "was not a reconstructionist and had no training in ballistics. We therefore conclude that he was unqualified to testify as to the trajectory of the bullets."); *Floyd v. State*, 569 So.2d 1225, 1232 (Fla. 1990) (officers unqualified to testify stab wound on victim's hand was defensive wound).

Reynolds's postconviction motion alleges his defense counsel unreasonably failed to object to Detective Parker's opinion that the door notch did not cause Reynolds's injury as Parker was not qualified as an expert in metallurgy or the rate of oxidation of aluminum, and prejudiced Reynolds as it was used to persuade jurors that Reynolds's explanation for his injury was a fabrication, meriting an objection. Counsel's failure to object to this lay opinion testimony was a serious deficiency. Whether counsel's failure to object to this unqualified lay witness opinion testimony was a reasonable trial strategy must be determined by evidentiary hearing. See *Collins v. State*, 671 So.2d 827 (Fla. 2nd DCA 1996)

("Matters of trial strategy should not be determined without an evidentiary hearing."); *Button v. State*, 941 So.2d 531 (Fla. 4th DCA 2006) (same).

SUMMARY DENIAL OF CLAIM 12

COUNSEL WAS INEFFECTIVE AND PREJUDICED DEFENDANT WHEN COUNSEL FAILED TO OBJECT TO IMPERMISSIBLE LAY WITNESS TESTIMONY CONCERNING THE CONDITION OF DEFENDANT'S CLOTHING ON THE DAY OF THE HOMICIDES

Reynolds's landlord, who led police to Reynolds's clothes on a line, was allowed to offer a lay witness opinion it had been recently bleached, without explaining how or why she thought it was bleached, instead of simply faded. Postconviction Motion, pages 58-61.[8] As his landlord was neither a chemist, nor

[8] Reynolds's landlord's trial testimony in this regard consisted of the following:

> Q. Okay. Now, clothes, did you see any clothes that appeared to have been washed -
> A. Yes.
> Q -- recently? And tell us about that.
> A. There was a clothesline approximately fifty feet from where the washing machine was, and it was full of clothing that had been washed.
> Q. Were these men's clothes or women's clothes?
> A. Men's clothes.
> Q. Anything that appeared to be significant about any of those clothes?
> A. They appeared to be bleached, strongly bleached They were very faded.

(V13, 1307).

in the clothes cleaning business, Reynolds's counsel was ineffective and prejudiced the fairness of his trial by failing to object to this impermissible lay witness opinion testimony on the condition of his clothing on the day of the killings. Id. Laschance lacked the special knowledge, experience, skill or training required to state an opinion whether the condition or makeup of Reynolds's clothing showed it had been bleached. See *Nardone v. State*, 798 So.2d 870 (Fla. 4th DCA 2001) (officer's opinion testimony that metal strip used in assault was deadly weapon reversible error as officer did not witness assault, testimony not based on officer's personal observations on how metal strip was used, and there was no predicate for expert testimony as there was no evidence how defendant used strip and no showing such factual determination was not within the realm of ordinary juror's knowledge and understanding).

The State's notion that "Laschance's testimony was cumulative to that of Ann Coy and Charles Badger," State's Answer Brief, page 60, is (at best) strained. Coy collected the clothing because Laschance said it seemed to have been bleached (V13 1306), and Badger testified that, as a general proposition, washing clothes could remove DNA. (V16 1992). Reynolds's landlord's lay opinion suggesting Reynolds's consciousness of guilt was improper and prejudicial--and

merited an objection. Counsel's failure to object to what amounted to expert opinion testimony by a lay person resulted in ineffective assistance.

Reynolds's defense counsel unreasonably failed to object to the landlord's lay opinion that Reynolds's clothing had been "recently" bleached. She had no background allowing her to judge the condition or makeup of the clothing. She had no chemical or business background allowing her to render an opinion on whether Reynolds's clothes had been bleached. This testimony, elicited as an opinion to show consciousness of guilt, should have been objected to as it was unfairly prejudicial, and counsel failed to seek a basis for the opinion on re-cross.

Whether defense counsel's failure to object to this unqualified lay witness opinion testimony was a reasonable trial strategy must be determined after conducting an evidentiary hearing *Button v. State*, 941 So.2d 531 (Fla. 4th DCA 2006) ("Matters of trial strategy should not be determined without an evidentiary hearing.").

SUMMARY DENIAL OF CLAIM A-III

THE LETHAL INJECTION OF MR. REYNOLDS UNDER THE STATE'S PROCEDURES VIOLATES HIS RIGHT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BECAUSE EXECUTION BY LETHAL INJECTION IS CRUEL AND/OR UNUSUAL PUNISHMENT

Reynolds asserts the current method of execution in Florida by lethal injection under § 922.105, Florida Statute (2007), violates Eight Amendment proscriptions against cruel and unusual punishment, and those contained in Article I, Section 17, of the Florida Constitution, as the drugs used in such executions cause extreme and unnecessary pain, though the combination of chemicals masks the pain experienced from the sight of those administering or viewing the execution.

While the State lists a number of cases in which this Court rejected challenges to Florida's lethal injection protocol in 2009, State's Answer Brief, page 61, the State makes no case-specific argument to overcome Reynolds's constitutional challenges *in this case*, which should be reversed and remanded for an evidentiary hearing to determine whether the particular lethal injection protocol violates Eight Amendment proscriptions against cruel and unusual punishment, and those contained in Article I, Section 17, Florida Constitution.[9]

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[9] The Eighth Amendment prohibits governmental imposition of cruel and unusual punishments, and bars infliction of unnecessary pain in the execution of the death sentence. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464, 67 S. Ct. 374 (1947) (plurality opinion). Punishments are cruel when they involve torture or lingering death. *In re Kemmler*, 136 U.S. 436, 447, 10 S. Ct. 930 (1890). The meaning of "cruel and unusual" must be interpreted in a flexible and dynamic manner, *Gregg v. Georgia*, 428 U.S. 153, 171, 96 S.Ct. 2909 (1976) (joint opinion), and measured against evolving standards of decency that mark the progress of a maturing society, *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590

SUMMARY DENIAL OF CLAIM A-IV

TRIAL COUNSEL FAILED TO REQUEST THAT SLEEPING JUROR GOLDEN BE REMOVED DURING CRITICAL TESTIMONY PRESENTED BY STATE AFTER THE TRIAL COURT HAD ALREADY ADMONISHED THE JUROR THAT IT WOULD REQUIRE HER TO STAND OR TAKE DRASTIC MEASURES IF SHE FELL ASLEEP AGAIN

Though the State's Answer Brief claims "[c]ounsel consulted with Reynolds and Reynolds did not want the juror removed," State's Answer Brief, page 61, no such statement by Reynolds appears on the record, and the Motion alleges "Defense Counsel misstated Mr. Reynolds's position when it told the Court that Mr. Reynolds wanted the juror to remain on the panel." Amended Corrected and Supplemental Motion, Page 33. As whether defense counsel misstated Reynolds's position on removing the sleeping jury is a disputed issue of fact, an evidentiary hearing is required in order to resolve this claim. *Seibert v. State*, Nos. SC08-708, 08-1615, --- So.3d ----, 2010 WL 2680239 (Fla. 2010) (this Court accepts motion's factual allegations as true and affirms only if it fails to state facially sufficient claim or there is no issue of material fact to be determined). See

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(1958) (plurality opinion). Florida's lethal injection method of execution creates a foreseeable risk of unnecessary and extreme human pain and therefore violates both the Eighth Amendment to the United States Constitution and Article I, Section 17 of the Florida Constitution, prohibiting cruel and unusual punishments.

also *Amendments to Fla. Rules of Crim. Pro. 3. 851, 3.852, & 3.993,* 772 So.2d 488, 491 n. 2 (Fla.2000) ("an evidentiary hearing is mandated on initial motions which assert . . . legally cognizable claims which allege an ultimate factual basis").

SUMMARY DENIAL OF CLAIM A-V

TRIAL COUNSEL FAILED TO PREPARE THE DEFENDANT TO TESTIFY ON HIS OWN BEHALF AFTER INFORMING THE JURY THAT THE DEFENDANT WOULD TESTIFY AND AFTER TRIAL COUNSEL INFORMED POTENTIAL JURORS THAT HE WAS A CONVICTED FELON. TRIAL COUNSELS' INEFFECTIVE ASSISTANCE OF COUNSEL VIOLATED THE DEFENDANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

The State misapprehends this ground. Reynolds alleged that, in its opening statement, counsel twice promised jurors Reynolds would testify to facts the defense intended to prove (V11, 828, 830); that counsel told the *voir dire* panel he was a convicted felon who had been in prison (V10, 721-722); that while Reynolds knew the jury was expecting him to testify to facts alluded to in opening, counsel did not prepare him to testify and advised him not to testify; that prior to his response to the trial court's inquiry into whether Reynolds wanted to testify, counsel told him that if he testified he would get the death penalty; that Reynolds saw counsel's statement as

a threat prompting a coerced waiver of his right to testify (V20, 2730-2731); that counsel was ineffective in informing potential jurors Reynolds was a convicted felon and telling seated jurors Reynolds would testify; and that counsel coerced his waiver of his right to testify. Amended Corrected & Supplemental Motion, pages 36-40.

Reynolds alleged that, had counsel prepared him to testify and not threatened him that if he testified he would get death, he would have testified in his own behalf; that, had he testified, he would have provided evidence counsel could only allude to in opening, telling jurors police did not believe Reynolds's explanation for his injury; that although State witnesses testified Reynolds went to the hospital, he could have testified to what happened when he sustained the injury, what happened at the hospital and why he cooperated with police, providing hair and blood samples; that before and throughout his custody, he maintained his innocence; that he had a friendly relationship with Danny Privett, and did not kill Danny, Robin Razor, or their daughter, Christina Razor; that he often socialized with Danny and liked the family so much he gave Danny‘s brother his dog; that he could have explained inconsistencies and conflicting evidence by State witnesses, including how his DNA could have been in the victims' trailer, though he had never been inside; that the towel supposedly found in the victims’ trailer actually belonged to him, and was

mishandled during a search he authorized of his residence; that he never changed his version of events; and that his testimony would have been a powerful contribution to the defense. Reynolds's motion noted jurors would have been able to make a determination of his credibility if they had an opportunity to hear it, as promised in counsel's opening; that Reynolds is articulate and respectful; that his sincerity would not have been lost on the jury; and that Reynolds could have refuted testimony of the two convicted felons who testified that their conversations with Reynolds amounted to confessions. Amended Corrected & Supplemental Motion, pages 40-42.

Reynolds's motion alleged counsel failed to investigate or challenge jailhouse witnesses, and that he could have explained to his jury how this testimony could have been obtained if counsel had interviewed jail personnel present during the alleged exchanges; that at the close of the penalty phase, the court asked Reynolds only if he wanted to present evidence of mitigation (V25, 74); that the trial court did not ask him if he wanted to waive his right to testify, or if his decision not to present mitigation was voluntary; that he told the court, without a word from counsel, that he believed he would be sentenced to death and saw no purpose in presenting evidence; that at the *Spencer* hearing, he told the court he should have testified (V26, 3641), regretted taking counsel's advice, and realized the chilling effect it had on

him, telling the trial court what he would have testified to if he had an opportunity. (V26, 3610-3701). Amended Corrected & Supplemental Motion, pages 42-43.

A criminal defendant's right to testify is a fundamental right under both the Florida and United States Constitutions. *Deaton v. Dugger*, 635 So.2d 4 (Fla.1993). "This right is personal to the defendant and cannot be waived either by the trial court or by defense counsel." *United States v. Teague*, 953 F.2d 1525 (11th Cir.1992). To waive this right, an accused must make a knowing, voluntary and intelligent waiver. *Deaton*, 635 So.2d at 8. Here, Reynolds has both alleged and testified attorney Laurence told him if he were to testify, it would "f---ing kill him." (PCR 537).

Asked at evidentiary hearing on other claims whether he told Reynolds if he testified "it'll f---ing kill you," Laurence replied: "It sounds like something I would say, but I don't recall saying it." (PCR 911-12). Thus, Reynolds's testimony counsel told him if he testified he would die is uncontradicted. *Tal-Mason v. State*, 700 So.2d 453, 455 (Fla. 4th DCA 1997) (where counsel testified at evidentiary hearing "I don't recall as I sit here now what the exact situation was at that period of time. But I think that certainly would be the type of information that I would discuss--would have discussed," movant's allegation and testimony on attorney's misadvice deemed uncontradicted). When the record does not conclusively

demonstrate that a defendant is entitled to no relief, it is necessary to return the case to the trial judge for the development of the record on any unresolved issues." *Id.*, 700 So.2d at 456; *Cobb v. State*, 582 So.2d 81 (Fla. 1st DCA 1991) (claim attorney told accused she would get death if she did not plead to first-degree murder, rendering plea coerced, stated *prima facie* case, requiring remand for either attachments conclusively showing no entitlement to relief or evidentiary hearing); *Visger v. State*, 953 So.2d 741 (Fla. 4th DCA 2007) (counsel's deficiency in advising burglary defendant not to testify resulted in prejudice as testimony would be only evidence supporting his defense he was invited into home to buy drugs).

As Reynolds's testimony counsel said if he testified "it'll f---ing kill you" (PCR 537) is uncontradicted by counsel's testimony "[i]t sounds like something I would say" (PCR 911-912), and because, moreover, the State's only attachment to its Answer (adopted by the trial court) is a reference to the record indicating the trial court "conducted a complete colloquy regarding whether he would testify and Reynolds stated that he did not want to testify" State's Answer, pages 8-9, no files or records conclusively show that Reynolds is not entitled to relief on this claim concerning what counsel told Reynolds *off-the-record* just prior to that colloquy.

An evidentiary hearing is therefore required at which to adduce evidence on whether counsel's advice that if Reynolds were to testify he would receive the death penalty rendered his decision not to testify unintelligent and unknowing; and whether the thwarting of Reynolds's putative trial testimony resulted in prejudice.

II.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S CLAIMS 3B, 4, 8, A-I & A-II, AFTER AN EVIDENTIARY HEARING AS ITS FINDINGS ARE NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE

An evidentiary hearing was held September 14th through 16th 2009, on Claims 3B, 4, 6, 7, 8, 9, 11, 13, A-I, and A-II, which the trial court denied in a written order. Solely the trial court's denial of Claims 3B, 4, 8, A-I & A-II after testimony at the evidentiary hearing will be examined in the following sections.[10]

CLAIM 3B

[10] On review of a trial court's ruling after holding an evidentiary hearing on an ineffective assistance claim, this Court gives deference to the trial court's factual findings to the extent they are supported by competent, substantial evidence, but reviews *de novo* the court's determinations of deficiency and prejudice, which are mixed questions of fact and law. *Arbelaez v. State*, 898 So.2d 25, 32 (Fla. 2005).

COUNSEL WAS INEFFECTIVE IN THE GUILT PHASE FOR FAILING TO OBJECT TO THE STATE'S UNSUPPORTED ARGUMENT THAT A SEXUAL BATTERY WAS THE MOTIVE FOR THE MURDERS

Reynolds's Claim 3B asserts his appointed defense counsel was ineffective in failing to object to the State guilt phase closing argument that Reynolds's motive for the killings was the uncharged Attempted Capital Sexual Battery of an 11-year-old.

The State's notion that "Reynolds makes no record cite to any allegedly objectionable statement," State's Answer Brief, page 67, is unsupported by this Court's file. Reynolds makes extensive record citations, Appellant's Initial Brief, pages 62-63 n.6, discussing in detail at least 103 pages of the record in showing the trial court's ruling on this claim is unsupported by competent substantial evidence.

The propositions advanced in the State's Answer Brief, pages 67-68, are not supported by competent substantial evidence, but mere speculation. The State's conclusion that "[t]he attempted sexual battery motive was a fair inference from the evidence," rests on two flawed assumptions: (1) that "[w]itnesses had testified that the child victim always slept in her panties, but those panties had been removed," and (2) that "there was one of [Reynolds's] pubic hairs found near her body." Order Denying Relief, page 3. Those notions are unsupported by the record: (1) First, the record trial testimony was that Christina was seated on the couch,

when found along with her mother, with no sign of sexual assault. (V11, 876-877, 926, 942, 947; V12, 1008; V15, 1657, 1691-1692). No evidence indicated any panties were "removed." Though Christina Razor's grandmother, Shirley Razor, *who she had not lived with for eight months to a year* (V11, 854), replied "yes" to the State's leading question "did she normally wear panties when she slept?", Shirley had already testified that when Christina slept at her home, "She either had on a big T-shirt or she had on a little gown." (V11, 855). No panties were mentioned prior to the State's suggestion in this regard. (2) Second, though the trial court concluded "there was one of [Reynolds's] pubic hairs found near her body," the record reveals when the evidence folder marked as containing a pink pillow was opened to sweep for evidence, it also contained a blue towel, which FDLE Forensic Technologist Sabrina Gayer testified violated agency protocols and caused cross-contamination. (V14. 1451-1489). While DNA from a pubic hair in the folder matched Reynolds (V14, 1513-1514; V16, 1968-1972), Gayer testified that due to cross-contamination, there was "no way of telling what came from what." (V14, 1480). Christina's DNA was not found on Reynolds (V17, 2017-2020), and Reynolds's DNA not found on Christina (V15, 1769-1781; V16, 1941-1944, 1963-1967, 1982-1991; V17, 2008-2012, 2020-2022, 2027-2029).

The only item *in the record* even hinting that it could have been reasonable for Reynolds's former defense counsel not to object to the State's attempted sexual battery argument--accusing Reynolds of an uncharged crime--is Reynolds's former defense counsel's own retrospective *legal opinion*, "testify[ing] that, in his opinion, the comment was not objectionable." State's Answer Brief, page 69.

The State cites no law--and does not even argue--that it is permissible to accuse Reynolds of this uncharged crime, and Florida law holds to the contrary.[11]

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[11] The trial court ignored that the State argument accused Reynolds of an uncharged attempted capital sexual battery. *Foy v. State*, 115 Fla. 245, 155 So. 657 (1934) ("prosecution…cannot…lead the jury to believe that the accused should be found guilty of the particular crime charged because of his being suspected or accused of other offenses"); *Coverdale v. State*, 940 So.2d 558 (Fla. 2nd DCA 2006) ("trial court abused its discretion in denying the motion for mistrial with respect to the comment that Coverdale tried to molest Nina's daughter"); *Dawkins v. State*, 605 So.2d 1329 (Fla. 2nd DCA 1992) (arguing attempted murder defendant had unlawful possession of firearm--an uncharged crime--not harmless as it placed character in issue); *Gleason v. State*, 591 So.2d 278 (Fla. 5th DCA 1991) (comment attempted rape defendant committed uncharged crime reversible); *Birren v. State*, 750 So.2d 168 (Fla. 3rd DCA 2000) (argument defendant stole from state and fishermen improper where not charged with theft); *Ford v. State*, 702 So.2d 279 (Fla. 4th DCA 1997) (as movie claimed to be model for consensual sex in sexual battery, arguing movie had sinister ending unfair as there was no evidence of movie's ending); *Watson v. State*, 50 So.3d 685 (Fla. 3rd DCA 2010) (argument accused tried to hide drugs under seat before stop based on facts not in evidence error in trafficking case as no evidence showed accused hid drugs and knowledge of drugs was in dispute); *Ford v. State*, 702 So.2d 279, 280 (Fla. 4th DCA 1997) (unsubstantiated references to other crimes committed by defendant are particularly condemned and presumptively prejudicial); *Straight v. State*, 397 So.2d 903, 908 (Fla. 1981) ("the danger [is] that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt

The cases that the trial court relied on, now reiterated by the State, Answer Brief, page 70, are distinguishable from the cases enumerated in footnote 11 (see below), because, unlike cases in footnote 11, the cases the trial court and State relied on: (1) entail *penalty phase* comments, which this Court has held to higher standards of egregiousness than *guilt phase* comments; and (2) do not involve the State accusing a defendant of uncharged crimes.[12] As no case allows the State to accuse a defendant of uncharged crimes in closing, it avers conclusorily: "These findings

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of the crime charged"); *Huff v. State*, 437 So.2d 1087 (Fla.1983) (trial court erred in denying motion for mistrial as State implied in closing that defendant charged with murdering parents forged father's name on guarantee as evidence of motive, as State offered no evidence guarantee, which itself was in evidence, was forged).

[12] *Bertolotti v. State*, 476 So.2d 130 (Fla.1985)--cited by the trial court--did not, as here, entail *guilt phase* comments, nor, as here, accuse a defendant of uncharged crimes, but *penalty phase* comments. *id*., at 132-133. *Bertolotti* set a higher bar for reversal for improper penalty phase argument: "[W]here, as here, the determination of guilt has already been made...[i]n the penalty phase of a murder trial resulting in a recommendation which is advisory only, prosecutorial misconduct must be egregious indeed to warrant our vacating the sentence," id., at 133, and went on to warn argument "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law." *id*., 133-134. The trial court also cited *Mann v. State*, 603 So.2d 1141 (Fla.1992) (arguing psychologist implied acts were excusable as accused was pedophile fair comment *in penalty phase* as it negated psychologist's testimony that mental mitigators applied). *Mann* was *penalty phase* argument subject to *Bertolotti's* post-guilt egregiousness standard. The trial court's reliance on *Spann v. State*, 985 So. 2d 1059 (Fla.2008), also lacks force, as that case entailed improper bolstering to negate an accused's alibi; not whether, as here, the State may accuse a defendant of uncharged crimes.

are supported by competent substantial evidence." Answer Brief, pages 69-70. Failure to object to argument Reynolds was attempting an uncharged capital sexual battery wrought prejudice, as "[f]ew criminal allegations would be more prejudicial to a defendant than molesting a child." *Coverdale*, 940 So.2d at 561.

CLAIM 4

REYNOLDS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN THE PENALTY PHASE WHEN THE DEFENSE FAILED TO OBJECT TO THE SEXUAL BATTERY THEORY IN THE STATE'S CLOSING ARGUMENT OR EFFECTIVELY REBUT THE THEORY IN CLOSING. THE FAILURE TO OBJECT TO THE BADGER LIE IN THE GUILT PHASE ALSO RESULTED IN PREJUDICE IN THE PENALTY PHASE

Beyond altering the issue below and on appeal, Answer Brief, page 71, the State's argument on this point simply asserts conclusory statements that reiterate arguments made before the postconviction court. Answer Brief, pages 72-78.[13]

[13] The State's notion that "Reynolds makes no record cite to any allegedly objectionable statement," State's Answer Brief, page 71, lacks merit:

> Instead of confronting the State's HAC argument, defense counsel argued that a Sexual Battery motive did not support the aggravator that the murders were committed to avoid arrest. (V25, 109-110). Defense counsel failed to dispute the State's Attempted Sexual Battery accusation in its argument concerning the HAC aggravator, which the State urged was supported on that ground, and failed to object when the State argued Reynolds was attempting to commit Sexual Battery in support of the HAC aggravator. (Id.).

The issue below and on appeal is counsel's ineffectiveness in failing to object to the sexual battery argument in penalty phase closing, despite State argument that the accusation suggested Christina's death was heinous, atrocious or cruel (HAC); that, rather than confronting the HAC argument, counsel argued that a capital sexual battery motive did not support an aggravator that the murders were committed *to avoid arrest* (V25, 109-110), Appellant's Initial Brief, page 69; and that counsel discarded a second opportunity to refute Badger's uncorrected record testimony in the penalty phase by calling him as a witness, as counsel's failure to do so left unrefuted in jurors' minds the notion that Reynolds's DNA was found inside the vagina of the 11-year-old victim in arriving at its recommendation as to the appropriate punishment, id., pages 68-69, despite the truism that "[f]ew criminal allegations would be more prejudicial to a defendant than molesting a child," *Coverdale*, 940 So.2d at 561. A new penalty phase proceeding is required.

CLAIM 8

TRIAL COUNSEL WAS INEFFECTIVE AND PREJUDICED THE OUTCOME OF DEFENDANT'S CASE WHEN COUNSEL FAILED TO REQUEST A JURY INTERVIEW TO DETERMINE WHETHER ANY JURORS HAD SEEN AN IMPROPERLY CONSTRUCTED MEMORIAL OR SHRINE TO THE VICTIMS THAT WAS PLACED RIGHT OUTSIDE

Appellant's Initial Brief, page 68.

THE COURTROOM. COUNSEL WAS FURTHER INEFFECTIVE AND PREJUDICED THE DEFENDANT BY NOT MOVING FOR A MISTRIAL BASED ON THIS IMPROPER AND HIGHLY PREJUDICIAL STATE-SANCTIONED ACTION BY THE VICTIM'S FAMILY.

For this ground, Reynolds stands on the argument and citations of authorities contained in the Appellant's Initial Brief on Appeal.

CLAIM A-I

TRIAL COUNSEL FAILED TO INVESTIGATE AND PRESENT EVIDENCE OF SUBSTANTIAL MITIGATION, INCLUDING MENTAL HEALTH MITIGATION, FAILED TO ENGAGE EXPERTS TO INTERVIEW AND EVALUATE DEFENDANT, FAILED TO CALL WITNESSES TO TESTIFY DURING THE PENALTY PHASE WHO WOULD HAVE DEMONSTRATED DEFENDANT WAS NOT ONE OF THE WORST OF THE WORST PERSONS TO BE CONVICTED OF CAPITAL MURDER, FAILED TO INFORM DEFENDANT OF MITIGATION HE COULD HAVE PRESENTED TO THE JURY AND FAILED TO PRESENT DEFENDANT'S JURY WITH ANY REASON TO RECOMMEND LIFE OVER DEATH. REYNOLDS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DURING PENALTY PHASE VIOLATING HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

The only mention of evidence that could be presented in mitigation when waived was counsel's responses they were "ready to go forward and present a defense" and had "witnesses available." (V25 3488). There was no inquiry into available mitigation. The State notion "Reynolds is arguing that the trial judge

failed to conduct a proper *Koon*[14] hearing," Answer Brief, pages 82-83, misstates this claim of attorney ineffectiveness in failing to fully investigate mitigation to ensure waiver would be knowing and voluntary. *Ferrell v. State*, 29 So.3d 959 (Fla.2010) (failure to investigate mitigation made waiver unknowing/involuntary); *State v. Lewis*, 838 So.2d 1102 (Fla.2002) (though defendant may waive mitigation "he cannot do so blindly; counsel must first investigate all avenues and advise the defendant so that the defendant reasonably understands what is being waived and its ramifications and hence is able to make an informed, intelligent decision").

Counsel's evidentiary hearing testimony that "the judge asked me to testify as to what I would have presented if he had allowed me to, and I tried to keep it responsive, but brief" (V14, TR712), is belied by the trial record. The judge made no such inquiry. (V25, 3488). Both counsel focused on the guilt phase (PCR 676; 718-719), but should have investigated mitigation, engaged experts and shown the mitigation to Reynolds before handing him a waiver. Reynolds testified that, had he known what "mitigation" consisted of, and that there was a good amount of mitigation that could be developed and presented to his jury, he would not have

[14] *Koon v. Dugger*, 619 So.2d 246, 250 (Fla.1993) (establishing procedure where defendant refuses to present mitigation, including mandate that upon informing trial court of defendant's decision, counsel must state *on record* whether there is mitigation that could be presented and *what that mitigating evidence would be*).

signed the waiver placed before him on the eve of the penalty trial. (PCR 614). Had counsel properly investigated the evidence in mitigation, there remains a reasonable probability the penalty phase jury would not have recommended death, and the trial court would not have sentenced him to die.

CLAIM A-II

TRIAL COUNSEL FAILED TO INVESTIGATE OR PRESENT EXPERT OR CIVILIAN TESTIMONY TO SUPPORT THE DEFENSE THEORY THAT REASONABLE DOUBT EXISTED DUE TO A CONFLICT IN THE EVIDENCE OR BECAUSE THE EVIDENCE WAS LEGALLY INSUFFICIENT TO CONVICT THE DEFENDANT. TRIAL COUNSEL FAILED TO INVESTIGATE OR PRESENT EXPERT OR CIVILIAN TESTIMONY TO SUPPORT THE DEFENSE'S ALTERNATIVE THEORY THAT PERSON(S) OTHER THAN THE DEFENDANT KILLED DANNY RAY PRIVETT, ROBIN RAZOR AND CHRISTINA RAZOR

In support of this claim, and in opposition to the argument in the trial court and merely reiterated in the State's Answer Brief, Reynolds relies on the argument and citations of authorities properly briefed in Appellant's Initial Brief on Appeal.

Additionally, there was no evidence that Dr. Gary Litman, who was not present at trial or for the *Frye* hearing (PCR 863), was a "DNA expert." Indeed, as revealed by trial counsel's testimony at the evidentiary hearing, Litman had never been qualified as an expert and had never testified as an expert. (PCR 864-865).

CONCLUSION

The order denying each of these claims should be reversed and remanded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY a copy hereof was furnished to (1) Thomas Hastings, Office of the State Attorney, 101 Bush Blvd., Sanford, FL 32773, (2) Barbara Davis, Office of the Attorney General, 444 Seabreeze, Daytona Beach, FL 32118, (3) Michael

Gordon Reynolds, #324170, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, FL 32026, by U.S. Mail, this 10th day of August, 2011.

CERTIFICATE OF FONT AND TYPE SIZE

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